HEALTH AND LAW

Stark Law Changes Are on the Horizon

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With a lot of attention focused on the potential for national health care reform and the raucous town hall meetings held by various members of Congress, it is important to remember that there are three substantive changes to the Federal Ethics in Physician Self-Referrals Act (known as the “Stark Law”) scheduled to take effect on October 1, 2009. Physicians and hospitals should review their joint venture relationships and modify them as necessary to ensure compliance with the Stark Law.

A BRIEF HISTORY

The Stark Law (the statute and regulations) prohibits a physician from making referrals for certain designated health services (DHS) payable by Medicare to an entity with which the physician or an immediate family member has a direct or indirect financial relationship. The relationship can be in the form of an ownership/investment interest or a compensation arrangement. The Stark law also prohibits the entity from filing claims with Medicare for DHS rendered as a result of a prohibited referral.

On August 19, 2008, the Centers for Medicare and Medicaid Services (CMS) published final rule changes to the Stark Law as part of the 2009 Hospital Inpatient Prospective Payment Systems Rule (Final Rule). Many of the Final Rule changes took effect October 1, 2008. Three provisions – a modification of the definition of the term “entity;” restrictions on the use of certain “per-click” arrangements; and the use of percentage revenue rental changes – become effective October 1, 2009. Very recently, the U.S. District Court for the District of Columbia rejected a suit brought by a group of physicians and physician-owned entities to repeal these regulatory changes.
THE THREE CHANGES

Under the current Medicare payment rules, a health care professional can provide services “under arrangements” with a third party and bill Medicare for those services. The Stark Law’s current definition of an entity includes “only the person or entity that bills Medicare for the DHS, and not the person or entity that performs the DHS where the person or entity performing the DHS is not the person or entity billing for it” (73 FR 48721). The Final Rule modified the definition of entity to “clarify that a person or entity is considered to be ‘furnishing’ DHS if it is the person or entity that has performed the DHS, (notwithstanding that another person or entity actually billed the services a DHS) or presented a claim for Medicare benefits for the DHS” (73 FR 48721).

**Action Item:** As a result of the change in definition of the term “entity,” many “under arrangements” will need to be restructured to ensure an appropriate exception to the Stark Law is satisfied effective October 1, 2009.

The second change in the Final Rule eliminates the ability of physicians to use per unit of service or per-click payments in certain lease arrangements. The federal government has expressed concern that these sorts of “payments are inherently susceptible to abuse because the physician lessor has an incentive to profit from referring a higher volume of patients to the lessee” (73 FR 48713). As part of the Final Rule, CMS is prohibiting per-click payments to physician lessors for services rendered to patients who were referred by the physician lessor. The prohibition applies to per unit or per-click arrangements for the lease of space or equipment. As part of its commentary in the Final Rule, CMS highlights that leasing agreements must continue to be for fair market value and commercially reasonable even if there were no referrals between the parties.

**Action Item:** Percentage arrangements for lease or equipment for relationships involving DHS must be modified to comply with the Stark Law changes effective October 1, 2009.

The third change that takes effect October 1, 2009, prohibits percentage-based compensation in space or equipment leases.

Pursuant to the Final Rule, parties cannot use a compensation formula for space or equipment leases that is based on a percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated in the office space lease or to the services performed on or business generated by the leased equipment. Similar to concerns with per-click arrangements, the federal government believes that “the use of percentage-based compensation formulae to determine rental charges for office space or equipment poses a heightened risk of program and patient abuse” (73 FR 48710). Importantly, the expanded prohibition does not apply to management and billing arrangements, provided that these agreements are not combined with office space or equipment leases.

**Action Item:** Per-click arrangements for lease or equipment for relationships involving DHS must be modified to comply with the Stark Law changes effective October 1, 2009.

There is no certainty of what, if anything, the scope or impact of the proposed federal health care reform will bring. Physicians should re-focus on the three changes to the Stark Law that will impact their joint ventures and office lease and equipment arrangements on or before September 30, 2009, to ensure continued compliance with the Stark Law.

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